

DECISION AND FINDINGS
IN THE
CONSISTENCY APPEAL OF
ROGER W. FULLER FROM AN
OBJECTION BY THE
STATE OF NORTH CAROLINA
DEPARTMENT OF NATURAL RESOURCES AND
COMMUNITY DEVELOPMENT
October 2, 1992

SYNOPSIS OF DECISION

Roger W. Fuller (Appellant) owns an unimproved lot bordering Boiling Spring Lakes, in Brunswick County, North Carolina. Historically, the lot has been subject to erosion and flooding. In March, 1989, the Appellant applied to the U.S. Army Corps of Engineers (Corps) for a permit under § 404 of the Clean Water Act to restore the lot to its original dimensions by dredging submerged fill adjacent to the property and filling a section of the property bordering the lake. In conjunction with that Federal permit application, the Appellant submitted to the Corps for review by the North Carolina Department of Natural Resources and Community Development (State), the State of North Carolina's coastal management agency, under § 307 (c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(A), a certification that the proposed activity was consistent with North Carolina's Federally-approved Coastal Management Program (CMP).

On November 1, 1989, the State objected to the Appellant's consistency certification for the proposed project on the ground that the proposed project is not in accordance with North Carolina CMP public policies and objectives of protecting areas classified as conservation areas and discouraging projects which require the filling or significant permanent alteration of productive freshwater marsh.

Under CZMA § 307(c)(3)(A) and 15 C.F.R. § 930.131 (1988), the State's consistency objection precludes Federal agencies from issuing a permit for the activity unless the Secretary of Commerce (Secretary) finds that the activity is either consistent with the objectives of the CZMA (Ground I) or necessary in the interest of national security (Ground II). If the requirements of either Ground I or Ground II are met, the Secretary must override the State's objection.

On December 7, 1989, in accordance with CZMA § 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H, the Appellant filed with the Department of Commerce a notice of appeal from the State's objection to the Appellant's consistency certification for the proposed project. The Appellant based his appeal on Ground I. To find that the proposed activity satisfies Ground I, the Appellant's project must satisfy the four elements specified at 15 C.F.R. § 930.121. Upon consideration of the information submitted by the Appellant, the State and several Federal agencies, the Secretary made the following findings pursuant to 15 C.F.R. § 930.121(b):

Ground I

In order to find that the second element of Ground I has been satisfied, the Secretary must find that when performed separately or when its cumulative effects are considered, the proposed activity will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest. The Secretary finds that the Appellant's proposed project would adversely affect the natural resources of the coastal zone by eliminating emergent wetland and thereby resulting in the loss of valuable wildlife habitat and ecological functions unique to wetlands. In contrast, the Secretary finds that the proposed activity's contribution to the national interest would be minimal. Therefore, based upon the statutory criterion, the proposed project fails to satisfy the second element of Ground I. Because the second element of Ground I was not met, it was unnecessary to examine the other three elements. Accordingly, the proposed project is not consistent with the objectives or purposes of the CZMA. (Pp. 6-15.)

Conclusion

Because the Appellant's proposed project fails to satisfy the requirements of Ground I, and the Appellant did not plead Ground II, the Secretary will not override the State's objection to the Appellant's consistency certification, and consequently, the proposed project may not be permitted by Federal agencies.

DECISION

I. Background

Roger W. Fuller (Appellant) owns an unimproved lot adjacent to one of the Boiling Spring Lakes, in the City of Boiling Spring Lakes, Brunswick County, North Carolina. Letter from Roger W. Fuller to Hugh C. Schratwieser, Attorney-Adviser, NOAA, dated December 6, 1990 (Appellant's Brief), Attachment B, Department of the Army Corps of Engineers Water Quality Certification Exhibit (Appellant's COE Permit Application), dated March 31, 1989. The Appellant's property, which is nearly triangular in shape, is bounded to the northeast by one of the Boiling Spring Lakes, to the south by a residential road, and to the west by a residentially-improved lake-front lot. Appellant's Brief, Attachment A. Historically, the lot has been subject to erosion and flooding. Letter of Roger W. Fuller to Gray Castle, then-Deputy Under Secretary for Oceans and Atmosphere, (Appellant's Reply to State's Brief), dated February 9, 1991, at 1-2.

On March 31, 1989, the Appellant applied for a permit to restore his lot to its original dimensions by dredging 900 cubic yards of submerged "porus [sic] indigenous sand" adjacent to his property and placing the fill on a strip of his property bordering the lake, having the approximate dimensions of 265 feet long by 38 feet wide. Appellant's COE Permit Application. After the fill had stabilized, the Appellant proposed to construct approximately 265 feet of linear bulkhead. Appellant's Brief, Attachment B, COE Public Notice dated May 4, 1989 (COE Public Notice) and Appellant's Brief, Attachment B, Sheets 1 and 2, [attachments to Appellant's COE Permit Application.] Following discussions with North Carolina and U.S. Army Corps of Engineers (Corps) personnel, the Appellant revised his permit application on June 14, 1989, to "remove the retaining wall and [add a] buffer area". Appellant's Brief at 2. Specifically, the Appellant proposed creating a buffer area by extending the fill area by a width of four feet. Appellant's Brief, Attachment B, revision sketches dated June 14, 1989. The Appellant also proposed to extend the dredge area by a width of four feet to provide additional fill for the buffer area. Id.

During the pendency of the instant appeal, the Appellant submitted with his brief additional sketches, dating from December 2-4, 1990, illustrating his plans to excavate a strip of submerged land approximately 265 feet long by 50 feet wide and to install a "sedimentation control screen . . . until [the] filled area is completely sodded." Appellant's Brief, Attachment A, "Elevation Cross-Section", dated December 4, 1990. In his brief, the Appellant also proposed an alternative to his project which would involve restoring only the north end of his property by dredging an unspecified amount of submerged land and filling in

the north corner of his lot.¹ Appellant's Brief, Attachment A, "2. Alternatives", and sketches dating from December 2-4, 1990. This alternative plan was further illustrated in the Appellant's Reply to State's Brief, which included a revision sketch dated February 9, 1991, illustrating a fill area that the Appellant contends is "less than .03 acres" of his property.² Appellant's Reply to State's Brief, Attachment (1), dated February 9, 1991.

The stated purpose for the Appellant's proposed dredge and fill operation is two-fold: (1) to restore the existing lot to its original dimensions to maintain the required setback for potential future construction of a residence, water and septic system on the property and (2) to "restore the area . . . [to] correct the degradation that has occurred, . . . [and] provide a nearly water level buffer and grades that are ecologically superior to what now exists."³ Letter from Roger W. Fuller to Gray Castle, then-Deputy Under Secretary for Oceans and Atmosphere (Appellant's Final Brief), dated July 9, 1991, at 1; Appellant's COE Permit Application; Appellant's Brief, Attachment A, "Site Development Plan".

Pursuant to § 404 of the Federal Water Pollution Control Act, as amended (FWPCA), 33 U.S.C. § 1344, the Appellant applied to the Corps for a permit to complete the dredge and fill project. In that application, the Appellant certified to the Corps for the State of North Carolina's review under § 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(A), that the proposed activity was consistent with the State's Federally approved Coastal Management Program (CMP).

On May 4, 1989, the Wilmington District of the Corps issued a public notice of the Appellant's application. In response to that notice, both the U.S. Department of the Interior - Fish and Wildlife Service (FWS) and the North Carolina Wildlife Resources Commission (NCWRC) objected to the Appellant's proposed project. Letter from L.K. Mike Gantt, Supervisor, Raleigh Field Office, FWS, to Colonel Paul W. Woodbury, District Engineer, Corps, (FWS May 26, 1989, Letter), dated May 26, 1989. Memorandum from Richard B. Hamilton, Assistant Director, NCWRC to John Parker

¹ The Appellant claims that "[t]he plan as developed does not include the installatin [sic] of retainers or bulkheads." Appellant's Brief, Attachment A, "2. Alternatives". However, one revision sketch dated December 4, 1990, contains the notation: "As a last resort I would consider installation of a bulkhead only after filling, forming and grading is completed. Bulkhead material being considered is 2" tongue & groove lumber or concrete blocks." *Id.*, "Elevation Cross Section" dated December 4, 1990.

² The buffer area proposed by the Appellant in his February 9, 1991, revision appears to include a portion of the adjacent residential property. Appellant's Reply to State's Brief, Attachment (1), dated February 9, 1991. There is no evidence in the record to indicate whether or not the Appellant's neighbors would give their consent to the installation of a buffer area on their property.

³ The Appellant also asserts that his proposed project will "in it's [sic] completed form ... stabilize this area for years to come ... enhance water quality ...[and] the fresh water aquatic habitat." Appellant's Reply to State's Brief at 3.

Jr., Chief, Major Permits Processing Section, Corps, (NCWRC Memorandum), dated May 23, 1989.

On November 1, 1989, the North Carolina Department of Natural Resources and Community Development's Division of Coastal Management⁴ (State) objected to the Appellant's consistency certification for the proposed project on the grounds that it is inconsistent with the Boiling Spring Lakes Land Use Plan policies concerning development in "Conservation" class lands. Letter from George T. Everett, DNR, to Lt. Colonel Thomas C. Suermann, District Engineer, Corps (State Objection Letter), dated November 1, 1989. The Boiling Spring Lakes Land Use Plan was approved by the North Carolina Coastal Resources Commission on December 4, 1987 and incorporated into North Carolina's CMP. North Carolina's Response to Roger W. Fuller's Appeal and Statement of Supporting Information (State's Brief), dated January 29, 1991 at 2; 1987 Boiling Spring Lakes Land Use Plan Update (BSL Land Use Plan). Specifically, "Conservation" class lands in the City of Boiling Spring Lakes encompass the lakes and connecting wetlands of the community. BSL Land Use Plan, Section 3, Page 4. The purpose for classifying these lands as "Conservation" areas is "to provide for effective long-term management of significantly limited or irreplaceable areas." *Id.* The State emphasizes that the stated policies applicable to development in "Conservation" areas require that development avoid wetlands and areas containing threatened or endangered species. State's Brief at 3; BSL Land Use Plan, Policy 2.1.3(a), Section 2, Pages 5-6.⁵ The State has determined that the Appellant's project will have an adverse impact on waters and wetlands to the detriment of coastal zone resources.⁶ State's Brief at 8. The State has requested that the Appellant's COE Permit Application be denied unless the Appellant redesigns his proposal "in such a manner that the wetlands and waters of Boiling Springs Lake [sic] are avoided." State Objection Letter.

⁴ The North Carolina Department of Natural Resources and Community Development's Division of Coastal Management is North Carolina's Federally-approved coastal management agency under §§ 306 and 307 of the CZMA, 16 U.S.C. §§ 1455 and 1456, and 15 C.F.R. Parts 923 and 930 of the Department of Commerce's implementing regulations.

⁵ Policy 2.1.3(a) states: "The City supports the policies and regulations of the United States Corps of Engineers as it seeks to protect and conserve officially designated wetland areas under the "404" permit program. The City will make every attempt to preserve, in their natural state, any fragile areas in which threatened or endangered speciesw [sic] occur." Boiling Spring Lakes Land Use Plan, Section 2, Pages 5-6.

⁶ The State also informed the Appellant that if the State's water quality agency, the North Carolina Division of Environmental Management (DEM), denied a § 401 water quality certification for the proposed activity, the proposal would also be inconsistent with water quality policies listed in 15 NCAC 7M .0800. State's Objection Letter at 1. The water quality certification was, in fact, denied. Letter of R. Paul Wilms, North Carolina DEM, to Roger W. Fuller (North Carolina DEM Letter) dated November 7, 1989. In its denial of a § 401 water quality certification for the proposed activity, the North Carolina DEM noted that the proposed "filling of wetlands which are Waters of the State" would cause a loss of use that would be inconsistent with the Antidegradation Statement of the Environmental Management Commission's Water Quality Standards (15 NCAC 2B .0201). *Id.*

Under § 307(c)(3)(A) of the CZMA and 15 C.F.R. § 930.131, the State's consistency objection precludes the Corps from issuing a permit for the Appellant's proposed activity unless the Secretary finds that the activity may be Federally approved, notwithstanding the State's objection, because the activity is either consistent with the objectives or purposes of the CZMA or is otherwise necessary in the interests of national security.⁷

II. Appeal to the Secretary of Commerce

On December 7, 1989, in accordance with CZMA § 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H, the Appellant filed a notice of appeal from the State's objection to the Appellant's consistency certification for the proposed project.⁸ Letter of R.W. Fuller to Undersecretary [sic] John Knauss, NOAA, (Notice of Appeal), dated December 7, 1990. On January 29, 1991, the State filed a response to the appeal, after the Appellant perfected his appeal by filing supporting data and information pursuant to 15 C.F.R. § 930.125. The parties to the appeal are Roger W. Fuller and the State of North Carolina.

On March 25, 1991, the Department solicited the views of four Federal agencies⁹ on the four regulatory criteria that the Appellant's proposed project must meet for it to be found consistent with the objectives and purposes of the CZMA.¹⁰ All of the agencies responded. Public comments on the issues pertinent to the decision in the appeal were also solicited by notices in the Federal Register, 56 Fed. Reg. 12364 (March 25, 1991), (Notice of Appeal and Request for Comments), and The Brunswick Beacon (March 14 & 21, 1991). No public comments were received.

After the period for public and Federal agency comments expired, the Department provided the parties with an opportunity to file a

⁷ By letter dated November 20, 1989, the Corps informed the Appellant that his permit application had been denied and his file retired. Letter of Lt. Col. Thomas C. Suermann, Corps, to Mr. Roger William Fuller (Corps Letter), November 20, 1989. The Corps further informed the Appellant that because of unfavorable comments from the FWS and the EPA, it was unlikely a COE permit would be available unless the Appellant modified his project to lessen its impacts. Id. The Appellant was supplied with copies of these comments. Id. The wording of the Corps Letter raised a question as to whether the underlying Corps permit had been denied on its own merits, which would give rise to a dismissal of the appeal for good cause. Letter from Gray Castle, Under Secretary for Oceans and Atmosphere, to Roger W. Fuller, (Department Briefing Letter), dated November 5, 1990. However, after contacting the Corps, the Department determined that the Corps permit coordination procedure requires deferral of any decision until the outcome of the consistency appeal. Id.

⁸ The Appellant also requested that the appeal be stayed while an alternative proposal allegedly pending before the North Carolina DEM was decided. Notice of Appeal. At the expiration of the stay the negotiations did not successfully resolve the issues under dispute and the appeal process resumed.

⁹ Comments were requested from the Corps, the National Marine Fisheries Service, the Department of the Interior - FWS and the Environmental Protection Agency (EPA).

¹⁰ These criteria are defined at 15 C.F.R. § 930.121 and are discussed infra at 5-6.

final response to any submission filed in the appeal. Both the Appellant and the State submitted final briefs. All documents and information received by the Department during the course of this appeal have been included in the administrative record. However, I will only consider those documents relevant to the statutory and regulatory grounds for deciding an appeal. See Decision and Findings in the Consistency Appeal of José Pérez-Villamil, (Villamil Decision), November 20, 1991, at 3, citing Decision and Findings in the Consistency Appeal of Amoco Production Company, July 20, 1990, at 4.

Consistent with prior consistency appeals, I have not considered whether the State was correct in its determination that the proposed activity is inconsistent with North Carolina's CMP. See Decision and Findings in the Consistency Appeal of Korea Drilling Company, Ltd., (Korea Drilling Decision), January 19, 1989, at 3-4. Rather, I have examined the State's objection only for the purpose of determining whether it was properly lodged, i.e., whether the State's objection complied with the requirements of the CZMA and its implementing regulations. Id. I conclude that the State's objection was properly lodged.

III. Grounds for Reviewing an Appeal

Section 307(c)(3)(A) of the CZMA provides that the Federal permit required for the Appellant's proposed activity may not be granted until either the State concurs in the consistency of such activity with its Federally-approved CMP, or the Secretary finds that the activity is (1) consistent with the objectives of the CZMA or (2) otherwise necessary in the interest of national security. See also 15 C.F.R. § 930.130(a). The Appellant has pleaded only the first ground.

To reach a finding on the first ground, that the project is consistent with the objectives and purposes of the CZMA, I must determine that the activity satisfies all four elements specified at 15 C.F.R. § 930.121. Failure to satisfy any one element precludes me from finding that the project is consistent with the objectives of the CZMA. These requirements are:

1. The proposed activity furthers one or more of the competing national objectives or purposes contained in §§ 302 or 303 of the CZMA. 15 C.F.R. § 930.121(a).
2. When performed separately or when its cumulative effects are considered, it will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest. 15 C.F.R. § 930.121(b).
3. The proposed activity will not violate any of the requirements of the Clean Air Act, as amended, or the

Federal Water Pollution Control Act, as amended.
15 C.F.R. § 930.121(c).

4. There is no reasonable alternative available (e.g., location[,] design, etc.) that would permit the activity to be conducted in a manner consistent with the [State's coastal zone] management program.
15 C.F.R. § 930.121(d).

Element Two is dispositive of the issues in this case. Accordingly, I turn immediately to that element.

IV. Element Two

In past consistency appeal decisions, the Secretary has reached a determination on the second element of Ground I by evaluating and weighing the adverse effects of the objected-to activity on the natural resources of the coastal zone against its contribution to the national interest. Villamil Decision at 4-5. In order to properly evaluate any possible adverse effects to the wetland property at issue in the instant matter, I must initially address apparent discrepancies in the record concerning whether wetlands exist at the proposed project site and the total amount of wetlands that will be affected by the proposed project.

The Appellant argues that the site of his proposed project does not involve a "natural system" of the coastal zone or "high quality wildlife habitat". Appellant's Final Brief at 2. He contends that his proposed project will not adversely effect the natural resources of the coastal zone and result in the loss of valuable wetlands or habitat area because the wetlands are the "result from flooding of [his] private property which is outside of the deeded boundary of the [adjacent] manmade lake." Id. Conversely, the State contends that the site of the Appellant's proposed project does involve valuable wetland and shallow water habitat. State's Brief at 5.

A careful review of all of the submissions to the record by the Appellant reveals that the Appellant does not contend that emergent wetlands do not, in fact, exist on his property, but rather that "[t]he . . . flooding of [his] private property should not be permitted to create 'emergent wetlands' or 'submerged bottoms'." Appellant's Reply to State's Brief at 2. The Appellant submitted documentation with his brief and further explained in his Reply to the State's Brief that the manmade lake adjacent to his property "exceeds it's [sic] boundaries at least part of the year" because of the "unapproved modification" to the emergency spillway and a change of the method of lake level

control.¹¹ Id.; Appellant's Final Brief at 2; Appellant's Brief, Attachment C. The Appellant argues that because of a resulting rise in the level of the lake, "[t]he ordinary water line referenced by the state¹² is in reality a maximum high water line that is formed when the lake exceeds it's [sic] boundaries. This in effect confiscates private property without due process." Appellant's Reply to State's Brief at 2. The Appellant concludes in his final brief that he "cannot accept [the State's] claim [in the State's Brief at 5] to 0.22 acres of private property that is outside the boundary of this manmade lake." Appellant's Final Brief at 2.

In support of the State's position that the site of the Appellant's proposed project does involve wetlands is the determination of the North Carolina Wilmington Regional Office, Division of Coastal Management that:

"The scouring/erosion [of the Appellant's property] may have occurred due to man-made changes to the lake just to the south (across the road) from the subject property. The flow is from the south to the north across the front of the Fuller property. It is unknown whether the scouring would have happened with or without the changes in the lake. There is a well established four foot (approximately) fringe of marsh grass which would be destroyed if Mr. Fuller Proceeds [sic] with his plans."

Memorandum of Haskell Rhett, Coastal Field Representative, Wilmington Regional Office, through James Herstine, District Manager, Wilmington Regional Office to Steve Benton, Consistency Coordinator, State, (Wilmington Regional Office Memorandum) dated December 5, 1989.

In further support of the State's position are comments offered by the North Carolina Wildlife Resources Commission in response to the COE Public Notice. NCWRC Memorandum. The NCWRC conducted an on-site investigation on May 18, 1989, to assess construction impacts on the fisheries, wildlife and wetland resources. Id. at 1. The NCWRC found the following:

"If authorized, the project would result in the filling of approximately 0.22 acres of waters/wetlands associated with Boiling Springs Lake [sic] and the loss of productive

¹¹ According to the Appellant, the emergency spillway design for the lake dam was originally constructed with a height of 29'6". Appellant's Reply to State's Brief at 1. Because of an "unapproved modification" to the lake, this emergency spillway height was raised to an elevation of 31' feet at an unknown time. Id.; Appellant's Final Brief at 2; Appellant's Brief, Attachment C. Since 1986, the lake level has been maintained by "overtopping the emergency spillway instead of level control by sluiceway manipulation." Appellant's Final Brief at 2.

¹² See State's Brief, Statement of Facts, at 2.

shallow water fishery habitat. Dominant vegetation at the proposed project site included; soft rush (Juncus effusus), netted chain fern (Woodwardia aerolata), maidencane (Panicum hemitomon), water pennywort (Hydrocotyle umbellata), fragrant waterlilly (Nymphaea odorata), alligator-weed (Alternanthera philoxeroides), wax myrtle (Myrica cerifera), sweet bay (Magnolia virginiana), baldcypress (Taxodium distichum), red maple (Acer rubrum), black willow (Salix nigra), and assorted pines (Pinus spp.)"

NCWRC Memorandum at 2.

The record also contains relevant reviews of the Federal agencies that commented on this appeal. The FWS has commented that "[d]epositing fill at this site will result in the permanent loss of 0.22 acres of palustrine emergent wetland, which provides high quality wildlife habitat and helps maintain the quality of adjacent waters." Letter of Deputy Director, FWS, Richard M. Smith to Ole Varmer, Attorney-Adviser, NOAA, (FWS May 17, 1991, Letter), dated May 17, 1991.

Based upon my review of the evidence presented by both parties, I find that the evidence on balance dictates a finding that the site of the Appellant's proposed project does involve emergent wetlands. I base this finding on the opinion of the State, which is supported by comments by the FWS and the NCWRC. Based upon site visits and their expertise, the FWS and the NCWRC arrived at the same conclusion; that the site of the Appellant's proposed project involves wetlands. In contrast, I do not find the evidence presented by the Appellant on this issue persuasive. The Appellant's claims regarding his perception of the unauthorized overtopping of the lake's emergency spillway flooding his property cannot negate the existence of the emergent wetlands.

Concerning the amount of wetlands that will be affected by the Appellant's proposed project, the Appellant asserts that his proposal "is essentially a very small reclamation project." Appellant's Reply to State's Brief at 3. However, as stated infra at 1-2, the Appellant has submitted a number of revisions to his original COE permit application. The revisions contain imprecise drawings and a confusing assortment of oftentimes contradictory statements. See infra at 1-2. Based upon the numerous revisions submitted, it is not clear exactly how many cubic yards the Appellant intends to dredge from the adjacent lake, or exactly how many cubic yards of fill the Appellant proposes to place on his property. Although the Appellant asserts in his Reply to the State's Brief that "the submerged area on the lot is approximately 1100 square feet which is less than 0.03 of an acre", it is apparent from a review of all of the Appellant's submissions, that the Appellant intends to seed an area of unspecified dimensions adjacent to the lake with grass.

Appellant's Reply to State's Brief at 1 & 3. Additionally, the Appellant intends to "[e]rect [a] sedimentation control fence as required on [the] east side of [the] buffer area to prevent siltation of [the] lake until [the] grass is sufficiently developed to inhibit erosion."¹³ Appellant's Brief, Attachment A, Restoration Plan.

In its brief, the State acknowledges that the Appellant has modified his project by proposing to eliminate the bulkhead and stabilize the fill with a clay cap and vegetation, but the State asserts that the extent of the proposed fill remains the same. State's Brief at 2. In fact, the State finds that "the proposed filling would result in the loss of approximately 0.22 acres of waters and wetlands." *Id.* at 5. The State does not address the Appellant's alternative of restoring only the north end of his property in its final brief. See The State of North Carolina's Final Argument in Support of the State's Consistency Objection (State's Final Brief) dated July 9, 1991.

There is, in fact, substantial evidence in the record that the Appellant's proposed project would affect 0.22 acres of wetlands. This determination is supported by comments by the FWS which I find particularly persuasive: "Depositing fill at this site will result in the permanent loss of 0.22 acres of palustrine emergent wetland. . ." FWS May 17, 1991, Letter.

The Appellant has failed to offer any clear evidence to support his assertion that there will be a lesser reduction of wetland property. Balancing the Appellant's imprecise revisions against the findings of the State as well as the natural resource management agencies commenting on this appeal, I find that 0.22 acres of palustrine, emergent wetlands would be filled as a result of the Appellant's proposed project.

A. Adverse Effects

Having determined that the project would result in the filling of palustrine, emergent wetlands, I may now turn to analyzing the adverse effects of the objected-to activity on the natural resources of the coastal zone against its contribution to the national interest. To perform this weighing, I must first identify whether there are any adverse effects of the proposed project and then determine whether those adverse effects are substantial enough to outweigh the activity's contribution to the national interest. Decision and Findings in the Consistency Appeal of Michael P. Galgano (Galgano Decision), October 29, 1990, at 5;

¹³ It is not clear from the Appellant's Attachment to his Reply to State's Brief if he is still considering "as a last resort" the installation of a bulkhead consisting of lumber or concrete blocks. Appellant's Brief, Attachment A, "Elevation Cross Section" dated December 4, 1990.

citing Decision and Findings in the Consistency Appeal of Texaco, Inc., (Texaco Decision), May 19, 1989, at 6.

I must consider the potential adverse effects of the project by itself and in combination with other past, present, or reasonably foreseeable activities affecting the coastal zone. Galgano Decision at 5, citing Texaco Decision at 6. A review of the submissions to the record by the parties and the Federal agencies commenting on this appeal reveals the identification of two potentially adverse environmental effects that would result from the Appellant's proposed project: (1) the destruction of wildlife habitat and (2) a decline in water quality.

The Appellant argues that his project will "provide enhanced maintenance of this area of the lake for an extended period of time." Appellant's Final Brief at 3. Moreover, the Appellant contends that his alternative proposal is "a real and beneficial solution to the problem of continued degradation of this specific section of the lake." Id. However, the Appellant presents no evidence that his alternatives will mitigate the loss of emergent wetlands located on his property.

Conversely, the State argues that the Appellant's proposed project will have adverse effects and identifies the primary adverse effect as "the loss of approximately 0.22 acres of waters and wetlands" due to the dredge and fill associated with the project. State's Brief at 5; citing comments of both the NCWRC and the FWS, which are discussed infra at 7-8. Additionally, the State argues that "the proposed filling would eliminate existing instream uses in that it would result in the destruction of the water and wetland resources" resulting in a violation of state water quality standards. State's Brief at 6; see also infra at 3, fn. 6.

Previous Secretaries have determined that the quantity of wetland loss is not the only factor which will be considered in evaluating the adverse effects on the environment. Other factors may include, but are not limited to, the nature of the wetland loss and the effects of the wetland loss on the remaining ecosystem. See Decision and Findings in the Consistency Appeal of Shickrey Anton (Anton Decision), May 21, 1991, at 6.

The filling of 0.22 acres of palustrine, emergent wetlands would result in the loss of significant coastal fish and wildlife habitat. I base this finding first on the fact that the area has been designated pursuant to Boiling Spring Lakes Land Use Plan as a Conservation area. State's Brief at 2-3; BSL Land Use Plan, Section 3, pp. 4-5. Secondly, I again find persuasive the opinions of the FWS and the NCWRC that the site involves valuable habitat. Although the Appellant claims that "[t]his is not an area of high quality wildlife habitat, nor are any endangered species involved", he did not produce any supporting

documentation to substantiate this claim.¹⁴ Appellant's Final Brief at 2. In contrast, the FWS service biologists found that "[t]he site presently supports emergent vegetation, open waters and submerged bottoms that, in association with other characteristics, combine to provide a high quality environment for wildlife." FWS May 26, 1989 Letter. In addition, the FWS emphasized that "[t]he Service places considerable value on palustrine emergent wetlands. . . . They are generally recognized as habitats for resident and migratory fish and wildlife."¹⁵ Id.

I also find persuasive the State's evidence regarding what would be the adverse effects of the proposed backfill associated with the Appellant's project on the natural resources of the coastal zone. The State relied on the comments of the FWS and the NCWRC in its brief and concluded that "[g]iven the documented presence of valuable wetland and shallow water habitat on the project site . . . the . . . destruction of those resources [is certain] if the proposed filling occurs." State's Brief at 5.

The Department sought the views of four Federal agencies concerning the adverse effects of the Appellant's proposed project. The Appellant asserts that "none of the [responding agencies] have provided any overriding justification for this project not to proceed." Appellant's Final Brief at 3. In support of this conclusion, the Appellant cited various quotes from the responding agencies, such as the brief comment of the Corps, which found no basis for urging a Secretarial override of the State's decision. Letter of Lester Edelman, Chief Counsel, COE, to Ole Varmer, Attorney-Adviser, NOAA, dated April 22, 1991. The record reveals, however, that the Corps had previously corresponded with the Appellant and had advised him that because of unfavorable comments of the FWS and the EPA, "it is unlikely a Department of the Army permit would be available unless your project can be modified to lessen its impacts." Corps Letter.

The EPA also offered these comments on the proposed project's effects on the environment:

¹⁴ Specifically, the Appellant asserts that the "wide fluctuations in the levels of this land-locked, manmade lake renders the area . . . useless as a resident or "migratory?" [sic] fish habitat. Bare white sand that is exposed for a significant period of time each year is certainly not conducive to fish habitation." Appellant's Reply to State's Brief at 2.

¹⁵ Although the FWS did state that based upon their records, "there are no Federally listed or proposed endangered or threatened plant or animal species in the impact area" the FWS did note that there are "status review" species not yet formally proposed or listed as threatened or endangered. Interestingly, according to the 1987 Boiling Spring Lakes Land Use Plan Update, "[t]he 1983 Land Use Plan indicates that "fragile wetland areas in Boiling Spring Lakes may also contain the American Alligator, the Red Cockaded Woodpecker, and the Osprey. These three species are also considered endangered or threatened by the U.S. Fish and Wildlife Service." BSL Land Use Plan, Section 1, page 31.

"The available evidence indicates that the proposed activity could cause adverse effects on the natural resources of this wetland area. As noted in the Clean Water Act Section 404 (b)(1) Guidelines, "From a national perspective, . . . filling operations in wetlands, [are] is considered to be among the most severe environmental impacts covered by these Guidelines" (40 CFR 230.1(d))."

Letter of Richard E. Sanderson, Director, Office of Federal Activities, EPA, to the Honorable Gray Castle, Deputy Under Secretary for Oceans and Atmosphere, NOAA, dated May 17, 1991, at 2.

Further, the FWS May 17, 1991, Letter referenced comments previously given to the Corps in response to the COE Public Notice dated May 4, 1989:

Service biologists are familiar with the habitat in question based on previous visits to the area and based on habitat description provided in the Public Notice. The site presently supports emergent vegetation, open waters and submerged bottoms that, in association with other characteristics, combine to provide a high quality environment for wildlife. Characteristic wetland plants found along the lake fringe include cattail (Typha latifolia), soft rush (Juncus effusus) and scirpus (Scirpus sp.).

FWS May 26, 1989, Letter.

Absent any evidence in the record to the contrary, I find the conclusions of the Federal agencies persuasive. As previously discussed, in reviewing a project, I must review the project's adverse effects both independently and in combination with other past, present or reasonably foreseeable activities. In sum, I find that there is substantial evidence regarding the adverse effects on wildlife habitat. As discussed above, several commenting agencies have acknowledged the presence of emergent wetlands and have stated that the filling of these wetlands would destroy wildlife habitat. Despite an opportunity to respond to this evidence in his brief, the Appellant has not provided any substantive evidence to contradict the foregoing conclusions. Rather, he has only submitted evidence that he intends to fill the area with sand and seed the area with grass. Based upon an absence of clear evidence in the record to the contrary, I therefore find that the project will adversely affect the area by the loss of valuable wetlands and the destruction of valuable wildlife habitat.

There is also considerable evidence in the record that the Appellant's proposed project will degrade water quality. As

previously stated infra at 3, fn. 6, the North Carolina DEM denied a water quality certification for the proposed activity. North Carolina DEM Letter. The North Carolina DEM found that the "proposed project would result in the filling of wetlands which are Waters of the State. The filling of the waters would cause elimination of valuable uses which these waters provide." Id. In counter-argument, the Appellant asserts that "[a]s regards water quality, the development of the 4 foot wide buffer area proposed would certainly be beneficial to maintenance of water quality. This maintainable grassed buffer . . . would be far superior to the . . . area that now exists adjacent to the lake." Appellant's Reply to State's Brief at 3. However, the Appellant does not offer any documentation to substantiate his assertion that a grassed, buffer area is superior to the emergent palustrine wetlands in the protection of water quality.

On the one hand, the Appellant has submitted that his proposal to grass his property adjacent to the lake will improve water quality by "retard[ing] the future inflow of sediment into the lake." Appellant's Brief at 1. By contrast, resource management agencies have concluded that the wetlands in question already contribute to improving water quality in the area. North Carolina DEM Letter; FWS May 26, 1989, Letter; Letter of Richard E. Sanderson, Director, Office of Federal Activities, EPA, to the Honorable Gray Castle, then Deputy Under Secretary for Oceans and Atmosphere, NOAA, dated May 17, 1991. On balance, I conclude that the weight of the evidence presented on the question of the impacts of the proposed development on water quality dictates my finding that the project will adversely affect the water quality of the area. See Decision and Findings in the Consistency Appeal of Exxon Company, U.S.A. (Exxon Decision) June 14, 1989 at 11.

Therefore, after reviewing the submissions to the record by the parties and the Federal agencies commenting on this appeal, and given that the Appellant has not offered sufficient evidence to the contrary, I find in this case that the proposed project would lead to the destruction of valuable wildlife habitat and water quality reduction and therefore adversely affect the natural resources of the coastal zone.

B. Contribution to the National Interest

The national interests to be considered and balanced in Element Two are limited to those recognized in or defined by the objectives or purposes of the CZMA. See Korea Drilling Decision at 16. The CZMA identifies two broad categories of national interest in preserving and protecting natural resources of the coastal zone and encouraging economic development. See CZMA §§ 302 and 303.

The State contends that: "[t]he appellant has admitted that the proposed activities have little or no relationship to the

national objectives and purposes identified in the Coastal Zone Management Act." State's Brief at 3. The Appellant did, in fact, state in his brief:

"This project will have very little or no impact on national interests or on national security interests."

Appellant's Brief at 1.

I agree with the Appellant. While the CZMA encourages economic development,¹⁶ the Secretary has previously decided "the residential component of a project does not advance any of the CZMA's goals." Los Indios Decision at 11; citing DeLyser Decision. The Los Indios Decision quoted an explanation of the purposes and goals of the CZMA that are directly applicable to the residential component of the instant appeal:

"Nowhere in the CZMA or its history does there appear an express or implied goal of encouraging residential construction in the coastal zone. This silence certainly does not mean that such construction is prohibited; rather, it means that such activity is not isolated as a pursuit to be fostered by the legislation."

Los Indios Decision at 11, quoting DeLyser Decision at 8.

However, I find that the Appellant's stated desire to "restore and protect [his] property from further flooding and damage" and to prevent "any more of [his] property [from being] washed into the lake" coincides with a CZMA objective. See Appellant's Reply to State's Brief at 2. The management of coastal development to minimize the loss of life and property caused by improper development in an erosion prone area is among the national objectives of the CZMA. 16 U.S.C. § 1452(2)(B).

As I have previously discussed, the Department sought the views of four Federal agencies concerning the national interest in the Appellant's proposed project. However, none of the Federal agencies that commented on the appeal identified any national interest that would be served by the Appellant's proposed project. In fact, the FWS specifically commented that "the

¹⁶ The development that the Appellant is proposing is the possible future construction of a residence, a water well and a septic system. There is, however, substantial evidence in the record which gives rise to questions as to whether the Appellant may, in fact, ever be able to construct a residence on his property. The State notes that the Appellant's permit application and supporting documentation "raise a question as to whether the lot may legally be developed for residential purposes at all given the fact that it is designated on the subdivision plat as a 'reserved' area. The Town's zoning ordinances state that no building permit may be issued for any structure to be erected in an area designated as a 'reserved area' or 'park area' on the subdivision plat." State's Brief at 7, fn. 1. Further, the Wilmington Regional Office of the State's Division of Coastal Management found that "[t]own representatives indicate they do not favor the development of this lot for a residence" because the project is "inconsistent with their Land Use Plan." Wilmington Regional Office Memorandum.

applicant's existing proposal is not consistent with the objectives of the Coastal Zone Management Act to protect and preserve natural systems in the coastal zone." FWS May 17, 1991, Letter. Further, an examination of the comments by the FWS and NCWRC reveals that these agencies agree that the proposed filling of wetlands in this case would detract from, rather than contribute to, the national interest by eliminating wetlands that improve water quality and provide wildlife habitat.¹⁷

I find that the Appellant's proposed residential reclamation project would contribute minimally to the national objective of protecting the rights of property owners to preserve their property in an erosion prone area. This conclusion is consistent with this Department's finding in earlier appeal decisions. See Galgano Decision at 11.

C. Balancing

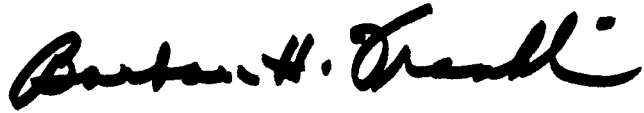
As the Secretary has stated in previous decisions, at the heart of Element Two is a balancing of the various effects a proposed project will have on the resources and uses of the coastal zone subject to the CZMA. In this case, I found that the Appellant's proposed project would adversely affect the natural resources of the coastal zone by eliminating emergent wetlands and thereby eliminating valuable wildlife habitat and degrading water quality. I also found that the proposed activity's contribution to the national interest would be minimal. In balancing these competing effects, I now find that the adverse effects of the proposed project outweigh its contribution to the national interest or, stated differently, "[w]hen performed separately or when its cumulative effects are considered" the activity will "cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh [the activity's] contribution to the national interest." 15 C.F.R. §930.121(b). Accordingly, the proposed project has failed to satisfy Element Two.

VI. Conclusion

Because the Appellant must satisfy all four elements of 15 C.F.R. § 930.121 in order for me to override the State's objection, failure to satisfy any one element precludes my finding that the Appellant's project is consistent with the objectives or purposes

¹⁷ The environmental effects of the project have already been discussed and will not be repeated on the national interest side of the balancing for Element Two.

of the CZMA. Having found that the Appellant has failed to satisfy the second element of Ground I, it is unnecessary to examine the other three elements. Therefore, I will not override the State's objection to the Appellant's proposed project.

A handwritten signature in black ink, reading "Barton H. Frank". The signature is fluid and cursive, with a prominent "B" and "F".

Secretary of Commerce